No. 91-252

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

JOSEPH A. LONGO, Petitioner,
v.

DON GLIME; D/B/A PERRI AUTO SALES,
MIDWEST AUTO AUCTION AND SERVICE,
JAMES KERNEN, ALVIN MICHEL,
MARTIN WALDMAN

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. The Sixth Circuit affirmed the district court's ruling, stating that the State and Federal odometer issues were complex and close, the various State and Federal theories against the auction "presents difficult questions", and that deference would be given because the district court judge was experienced and did not act clearly erroneously. Did the Sixth Court commit reversible error by ignoring the Supreme Court's ruling in Salve Regina v.Russell, 89-1629?

a). Odometer fraud costs consumers in excess of two billion dollars annually and endangers lives. In early 1991, CBS' 60 Minutes reported the rampant odometer fraud by dealers. 50%-90% of the automobiles that pass through Midwestern automobile auctions are tainted with odometer fraud! Deferring to the district court, did the Sixth Circuit err by not conducting a de novo review of the district court's ruling that under the Federal Odometer Act, an undisclosed agent is not liable? **Courts of Appeal differ.**

b). Deferring to the lower court, did the Sixth Circuit err by affirming the lower court's decision that an automobile auction can not be held liable for negligent misrepresentation, fraud, negligence, and under the Consumer Protection Act?

c). Deferring to the district court without conducting any review, did the Sixth Circuit err by denying the petitioner's motion to transfer to his home State, holding that the Supreme Court's decision in Worldwide prevented the transfer, though since Worldwide, the Supreme Court has greatly expanded personal jurisdiction?

2. Is an order regarding sanctions by a magistrate, a non-Article III judge, dispositive, requiring a de novo review? **Courts of Appeal differ.**

a). Did the district court err by improperly reviewing the sanction order against the petitioner when the petitioner demonstrated the magistrate's bias towards the petitioner?

b). Did the district court err by improperly reviewing the magistrate's denial of sanctions against the used car dealer's attorney under F.R.C.P. 11, 26, 37, AND 28 U.S.C.SECTION 1927 for executing answers to the complaint, affirmative defenses, and answers to the request to admit facts all affirming the mileage as actual when he possessed an odometer statement asserting unambiguously that the mileage was NOT actual and should not be relied upon? The High Court's guidance is needed in the massive application and non-application of sanctions.

3. Does the used car dealer's bankruptcy preclude a petitioner from proceeding against it to judgment, so that he could collect against the used car dealer's surety? Courts of Appeal differ.

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PARTIES

The petitioner is JOSEPH A. LONGO, and the respondents are DON GLIME; MIDWEST AUTO AUCTION & SERVICE, INC.; ALVIN H. MICHEL; JAMES KERNEN, and attorney, Martin G. Waldman.

OPINIONS BELOW

The Sixth Circuit's 12 March 1991 opinion is included in the appendix on page 37 and its denial of the petition for rehearing is included on page 43.

JURISDICTION

Invoking jurisdiction under 15 USC Sect. 1981, et seq., and pendent jurisdiction, the petitioner sued the respondents in the Southeastern district of Michigan for misrepresentation, odometer fraud, neglience, and violations of the consumer protection statutes. The petitioner presented **undisputed** documentary evidence that the mileage was not actual and that the used car dealer committed blatant odometer fraud. Also the petitioner proved that the the used car dealer's attorney concealed this documentary evidence, repeatedly refusing to produce it in discovery, and executed pleadings falsely stating that the mileage was unambiguously actual.

Indisputably, Midwest Auto Auction--where the used car dealer had been a regular customer for numerous years, having known the auctioneer for over 20 years--misrepresented through its auctioneer and other agents that the automobile had actual mileage, and was in perfect condition with new brakes. The petitioner presented Michigan regulatory bulletins, which were sent by the Michigan Department of State to Midwest, which put Midwest on notice that the automobile documents strongly indicated that blatant odometer fraud was being committed against the petitioner.

Nevertheless, the district court expanded Midwest's motion for dismissal and partial summary judgment and granted complete summary judgment to Midwest. The district court even argued that Midwest's misrepresentations were "puffing", though Midwest made no arguments refuting or explaining its misrepresentations. The district court refused to review de novo the magistrate's order of sanctions against the petitioner, though the petitioner demonstrated that the magistrate was biased.

Also, the district court refused to review de novo the denial of sanctions against the used car dealer's attorney. Finally, the district court refused to allow the petitioner to proceed to judgment against the bankrupt used car dealer, so that a claim could be made against the dealer's surety. The Sixth Circuit, stating that the issues were close and difficult affirmed on 3/12/91 because the district court judge was experience and did not act clearly erroneously. The petition for rehearing was denied on 5/8/91. The

petitioner seeks review of the Sixth Circuit's decisions.

STATEMENT OF CASE

On 18 July 1985, Auto Club Insurance Association, that is, AAA-Michigan, which routinely sells thousands of automobiles annually, sold a recovered stolen automobile to a broker-used car dealer, Glime, d/b/a, Perri Auto Sales for $5100.00 with a title and a separate odometer statement. On the separate (incoming) odometer statement, that is, the statement which Glime received from AAA and which passes only to the seller's immediate purchaser and not to future purchasers, AAA indicated that the mileage was **NOT** actual and should not be relied upon. (R5#51: Motion For Rule 11 Sanctions, Exh.3). Contrarily, on the title, which passes to all future purchasers, AAA stated, "I (We) state the odometer mileage on the vehicle is 58, 408." (emphasis added). (R11#138: Response to Motion to Dismiss and Summary Judgment, Exh.B).

Directly below the mileage of 58, 408, existed three(3) odometer boxes, one of which had to be marked. ibid. One box stated "mileage not actual." AAA did not mark this box. Directly above the mileage, the title stated:

> (State and federal regulations require you to state the Odometer Mileage upon transfer of ownership. An inaccurate statement may result in civil liability and civil or criminal penalties . . .).

Directly above AAA's signature and date, the title stated in bold:

> **ANY FALSE STATEMENT, ALTERATION, FORGERY, OR FRAUD IN CONNECTION WITH THIS TITLE TRANSACTION IS A CRIME.**

Next to their signature, AAA did type "ACIA", "AGT." and Glime's name and address. ibid. Glime was a repeat customer of AAA. Also, next to AAA's signature was a space for the sales price which AAA left blank. According to the U.S. Department of Transportation, the sales price aids purchasers to determine an automobile's condition and worth.

Approximately one(1) month after the sale, on 6 September 1985 the petitioner, in Michigan on 1-1/2 days of unrelated business with no intention of purchasing an automobile, accompanied a business associate to the Midwest Auto Auction where, upon information and belief, numerous non-Michigan Sellers and Purchasers frequent.

As a Midwest employee drove the subject automobile through the long bidding line, he stated that the automobile ran great. Also, a Midwest employee stated that the automobiles could not be driven or inspected and had to remain locked. Another person, whom the petitioner learned after the sale was defendant Glime, stated that the automobile was in perfect condition, had not been repainted, had new brakes and actual miles.

On the window, a Buyer's Guide was posted listing various "major defects that may occur in used motor vehicles." (R11#138, supra, exhibit I.) None were check marked. Also, posted was an unnamed auction ticket revealing that the automobile was inspected at 59,073 miles. The document includes a box "OK (D by)." This box only states "AM FM Cass. does not work." (ibid. exhibit D.) No other defects were listed.

When the subject automobile's turn arrived on the auction block for bidding, the Midwest auctioneer announced that it was in perfect condition with new brakes and had actual mileage. (ibid, exh. A). Midwest's principal, Glime, was not disclosed. (ibid, exh. A). Glime, a steady customer of Midwest, has known the auctioneer for 25 years. The automobile was sold for $9,000, in practically the same condition as upon Glime's purchase and practically double the purchase price from AAA of $5,100 about 1 month before.

After the petitioner presented a $9,000 check payable to Midwest, pursuant to its instructions, Midwest presented the Buyer's Guide and auction ticket. (ibid, exh. I, H & D). Midwest also presented the altered outgoing odometer statement(given to the petitioner) certifying as actual mileage 59,125 miles which was written over 59,055 miles. Exhibit C. Midwest also presented a title in which no odometer boxes were check marked by Glime's previous "owner." (ibid, exh. B). Midwest completed the bill of sale and the Michigan application for title by also including the mileage, and presented them to the petitioner.

Glime and Midwest knew that after the sale the automobile would be immediately taken to the petitioner's home in Illinois. (R5:#52, Second Motion for Default, exh. FF). Upon arrival, the automobile was repaired minorly: The lock where the

key is inserted to start the ignition was changed. ibid. Thereafter the automobile was stored until December 1985 when the petitioner would return permanently from his temporary Arizona employment. While stored, only the petitioner's father drove the automobile for a total of fewer than ten(10) miles to a mechanic for an oil change shortly after the sale at Midwest. The mechanic stated that the automobile had been repainted and sounded as if it had serious and dangerous mechanical defects. ibid.

After the petitioner returned home in late December 1985, he brought the automobile to this mechanic for clarification who stated that something was added to the oil to conceal the dangerous mechanical defects and that the automobile had significantly more than about 59,000 miles. ibid. He stated that the petitioner was fortunate: The engine could have collapsed internally while driving at 45 mph or higher, resulting in a fatal collision. ibid.

Completely shocked by the mechanic's assessment, the petitioner brought the automobile to another mechanic without informing him of the first mechanic's assessment. ibid. The second mechanic also stated that based on the gauges, the engine sounds. the bad transmission and just the overall condition, it was clear that the mileage was significantly more than about 59,000 miles and that something was added to the oil to thicken it and conceal the noises indicating serious and dangerous mechanical defects. ibid.

To make safe the automobile, it required repairs of approximately $5,000.00--more than one-half of the $9,000 purchase price. ibid. The petitioner attempted to sell the automobile vehemently, but it did not sell until nearly 2 years after purchase and only for about $7,000!

After the petitioner filed suit because the defendant refused to refund his purchase price, he discovered the 7/18/85 Bill of Sale from AAA to Glime. It included an odometer statement that 58,408 miles was NOT ACTUAL MILEAGE. The red flasher was marked "on", indicating that "Buyers should carefully check car for year, model, and equipment, regardless of any announcements made." (R11#138:Response to Motion for Dismissal and Summary Judgment, exhibit G.)

Also the Michigan Department of State with their pioneering Bureau of Automotive Regulations (B.A.R.) to combat odometer fraud submitted 2 regulatory bulletins distributed to all dealers. Midwest, Glime and, upon information and belief, AAA, as dealers, received these bulletins. These regulatory bulletins detail the law and factors evidencing odometer fraud.

At page 4(d) of the 4/9/84 regulatory B.A.R. bulletin, it states, regulatory "important - effective immediately" . . . "All titles in dealer's possession ... must have the odometer statement form provided on the title completed in full by the person named on the face of the title ". (emphasis added). ibid, exh. E. On the 12/21/84 B.A.R. regulatory bulletin, it states under Irregular Documents "blank ... mileage data on title documents," or altered mileage indicates odometer tampering. P.2,II, ibid, exh. F. In the instant case, the outgoing odometer statement was altered and the title odometer statement was blank.

REASONS FOR GRANTING CERTIORARI

1.THE SIXTH CIRCUIT ERRED BY NOT REVIEWING DE NOVO THE STATE AND FEDERAL QUESTIONS OF LAW.

While the petitioner's petition for rehearing was pending, the Supreme Court ruled in Salve Regina v. Russell, 89-1629, on 20 March 1991, within 1 week of the Sixth Circuit's 12 March 1991 decision. The fact that the Sixth Circuit's decision occurred about one week earlier does not the granting of certiorari or reversal summarily. Helvering v. Wiese, 292 U.S. 614(1934). In the 12 March 1991, the Sixth Circuit held that the federal and state odometer questions were difficult, complex and close. It also held that whether Midwest was liable for the state claims of misrepresentation, fraud, neglience and a violation of the consumer protection act was also close and difficult.

The Sixth Circuit resolved these close questions by stating that the district court judge was experienced and did not act clearly erroneously. Thus, the lower court's ruling was affirmed without a de novo review. Similarly, the Sixth Circuit did not review whether the district court erred in denying the petitioner's motion to transfer to his home state under 28 USC Section 1404(a).

While the petitioner's petition for rehearing was pending, he filed a motion requesting that the Sixth Circuit review de novo under Salve the close and difficult questions and not defer to the district court. The Sixth Circuit never ruled on this motion, but did deny the petition for rehearing on 8 May 1991 and issued a mandate on 24 May 1991. By defering to the district court, the Sixth Circuit effectively circumvented the Supreme Court's ruling in Salve Regina which states that the court of appeals is in the best position to analyze issues and promulgate solid law.

Also, by giving deference to the district court judge because he was experienced and did not act clearly erroneously, the Sixth Court ignored the established axiom that Federal statutory interpretations must be reviewed de novo, US v. Martinez, 890 F. 2d 1088(10th Cir. 1989), without giving any special deference to the decision below. US v. First City, 386 U.S. 361, 368(1967).

a). Did the Sixth Circuit by deferring to the district court err by affirming the district court which held that under the Federal Odometer Act, an undisclosed agent is not liable? Courts of Appeal differ.

According to the U.S. Department of Transportation, odometer fraud costs consumers in excess of two billion dollars annually and endangers lives. As reported by the National Consumer Law Institute, Boston, Ma., 50%-90% of the automobile that pass through Midwestern automobile auctions are tainted with odometer fraud! see also, Fed. Reg., Vol. 53, No. 151, p. 29464, et seq. 8/5/88.

However, automobile auctions are insulated from liability for not being the automobile's "transferor" and not being in the chain of title. One line of Federal cases holds that only a transferor can be held liable under the Federal Odometer Act. Duval v. Midwest Auto City, 578 F. 2d 721(8th Cir. 1978), McGinty v. Beranger Volkswagon, 633 F. 2d 226(1st 1980).

Whereas, another line of Federal and State cases holds that a transferor's agent can also be held liable. Alley v. Chrysler Credit, 767 F. 2d 138(5th Cir. 1985), Stier v. Park Pontiac, 391 F. Supp. 397(S.D. W. Va. 1975), Henricks v. Fletcher Chrysler, 570 N.E. 2d 115(Ind. App. 1991), contruing the Federal Odometer Act, Montague v. Heater, 836 F.2d 422 (CA8 1988), holding that an agent could be liable under the Missouri Odometer law which is similar to the Federal counterpart.

In Arnold v. Smith Motor, 389 F. Supp. 1020(Iowa 1974), the court stated that the Federal Odometer Act was similar to the Federal Anti-trust statute, and thus, must be construed liberally and similarly. In American Society v. Hydrolevel, 456 US 556(1982), the Supreme Court held that an agent could be held liable under the Anti-trust laws. It is respectfully submitted that the same holding should apply for the odometer act to satisfy the legislative intent and protect the public.

Midwest was Glime's **uncontroverted**, undisclosed agent. In the instant case, a civil case, the Sixth Circuit, stating that the

odometer questions were difficult, complex and close, affirmed the lower court that only a transferor could be liable. However, in an odometer criminal case, after thoroughly examining the legislative history, the Sixth Circuit stated that not holding agents liable would:

> create a gaping loophole in the law that would hinder, rather than promote, accurate reporting of mileage information to the consumer. Consider, for example, an automobile dealer's corrupt employee, who alters the odometer statements of his employer's vehicles without the later's knowledge. Under Clenton Henson's interpretation, this employee could not be convicted under Section 1990C because he is not a transferor. We do not believe the act countenances such an outcome.U. S. vs Henson, 848 F. 2d 1374, 1379 (CA6 1988), cert. denied, 109 S. Ct. 784,

This same reasoning should apply to civil cases as well. Promulgating 49 CFR Section 580, et seq., the U.S. Department of Transportation stated:

> to clarify the definition of transferor and transferee in the current regulation . . . (and) clarifying that the liability for issuing a false odometer disclosure statement could be placed on . . . an agent . . . (the definition of transferor) does not expose more people to the liability, but merely closes a loophole where defendants have escaped liability due to ambiguity in the current regulation. (Emphasis added). Fed. Reg., supra, p. 29464-29466.

The Department also stated:

> an employee or other agent of a principal should be liable for his actions . . .it is incumbent upon anyone acting as an agent . . . to obtain mileage information from the appropriate source.(emphasis added). Fed. Reg. Vol. 53, #51, 8/5/88, p. 29465, 29466.

Moreover, "transferor" **has always** included agents of the seller **under general legal principles of agency**. Ibid, P. 29464. These principles alone should have been more than sufficient to find Midwest liable under the broader Michigan Odometer Act--

with its pioneering state enforcement--which imposes duties on not only owners, but assignors. Glime assigned a duty to Midwest and designated Midwest with a particular purpose under Michigan's Odometer Act. Blacks Law Dictionary, infra, p.108, assign.

Section 1989 of the Federal Odometer Act states "any person who . . . violates any requirement imposed under this subchapter." By "any person", as opposed to "any transferor", congress intended to include agents. The statute's plain language with its remedial intent is important and must be executed. Miller v. Cir, 733 F. 2d 399 (CA6 1984), Roth v. Steel Products, 705 F. 2d 134 (CA6 1963).

The lower court erred by requiring a transferor to be in the chain of title. (R14#185, order & opin., p10). In Henson, infra, the defendant was liable, though never in the chain of title. Also, in Goeman v. Keating, 498 F. Supp. 700(S.D. 1980), the son, who was not in the chain of title, but who possessed the automobile, was liable, not the father. To require defendants to be in the chain of title effectively allows agents to escape liability for their intentional odometer fraud.

According to defendant and auctioneer Michel with 30 years of automobile auction experience, when an automobile is transferred to a dealer, he does not become the purchaser, but merely the assignee (R14#177, 2 Michel Dep. Tr. p. 19/4-20, 20/1-3), thus purchasing an automobile and being in the Chain of Title is not conclusive of ownership. Allowing Midwest to escape liability, under a very narrow construction of the Act would elevate form over substance and frustrate the legislative intent.

Agency aside, Midwest is liable as a transferor in their own right. Transfer is defined as "to change ownership by purchase, gift, or any other means.(emphasis added)." Sect. 1982(5). Midwest transferred the "ownership" by sale or "means" of its auction from the used car dealer to the petitioner. If the Act intended transfer to mean only conveying one's "ownership" directly from a seller to a buyer, ownership by purchase, implying a sale, and gift cover all possible ways of transferring ownership. The phrase "by any other means", thus, can not be viewed as superfluous in light of the Act's remedial purpose.

In Henson, supra, the defendant adopted a transferor's acts by aiding to commit a crime. Though not having the "causes to be done" language of criminal Section 1990c, civil Section 1989 states "any person who . . . violates any requirement . . . under this subchapter." (emphasis added). Midwest violated this subchapter.

The subchapter includes Sect. 1990 b & c, and Sect. 1986

for conspiring implicitly, if not explicitly, with any other person (Glime) to violate Section 1988, which was violated in Henson, supra. **Even if Midwest were not an agent, it would still be liable in its own right under section 1986 for conspiracy. Section 1986 does not require a defendant to be a transferor.** Henricks v. Fletcher Chrysler, supra.

Civil conspiracy exists when two or more persons act unlawfully. Tenborius v. Slatkin, supra. Direct proof of an agreement between co-conspirators is not required. Circumstantial evidence is sufficient; for example, a long-standing business relationship. Ibid. In 1986 Glime sold at Midwest alone over 200 automobiles, that is, 2 automobiles every auction day! Despite the blatant fraud and this lawsuit, Midwest has not restricted or prohibited Glime's business at Midwest. Glime has known the auctioneer for over 25 years.

Criminal law has a far heavier burden requiring stricter interpretations than civil law. Congress could not have intended to make it easier to prosecute a defendant criminally than to compensate defrauded consumers civilly.

INDICIA OF OWNERSHIP

One with a sufficient indicia of ownership is a transferor. U.S. v. Ellis, 739 F. 2d 1250 (CA7 1984), transferring title as a sham created sufficient indica of ownership. To own means "1. to have or hold as property: possess." Merriam-Webster's New Collegiate Dictionary, copyright 1984.

Midwest, as a bailee, held, had the qualified right to possession of the automobile, and had many "indicia of ownership". Ownership is:

> the right of one or more persons to possess and use a thing . . . right of possession . . . the right to control, handle, and dispose . . . ownership . . . is either absolute or qualified . . . the ownership is qualified when it is shared with one or more persons, when the time of enjoyment is deferred or limited, or when the use is restricted. (Citations omitted.) Black's Law Dictionary 5th ed., 1979, p. 997.

Many types and degrees of ownership; that is, possession, exist. Indeed, Michigan law broadly defines owner as the legal title holder, lessee, vendee or mortgagor, or one who leases an

automobile for more than 30 days (R14#185, order & opin., p.12). Michigan law, to satisfy the Act's remedial purpose, would consider Midwest's substantial control over automobiles--more than ordinary auctions--sufficient for "ownership."

One indicia of ownership is the right to refund the purchase price. If a purchaser complains about a faulty transmission, or if after the purchaser pays for the automobile, a garageman notices a defect, Midwest, not the "owner" and without the "owner's" approval, either contractual or otherwise, takes the automobile to the transmission shop to:

> have them evaluate the problem and approximate how much it will cost to repair it. He (the transmission shop) will tell us(Midwest) what he feels the problem is and give us an estimate of what he felt it would cost to repair. (supra, Kernan Dep. Tr. p. 96/20-24, 97/18-20), 97/1-10, 98/10-14, 98/18-20, 98/21-24).

Then the "owner" is telephoned and informed about the defect and cost of repair. (supra, Kernen Dep. Tr. p. 95/12-17). Clearly Midwest is no ordinary auction. If the purchaser is dissatisfied with the seller's adjustment, Midwest gives a refund (supra, Kernen Dep. Tr. p. 99/18-24, 100/1), even without the seller's, that is, "owner's" approval!

> If we feel something is wrong and the seller does not want to adjust (the price) or take care of the problem, then the man (purchaser) is going to get his money back. (supra, Kernen Dep. Tr. p. 94/19-20).

Midwest "voids the deal," not the seller (supra, 2 Michel Dep. Tr. p. 68/12-18). Midwest will remove from the auction line upon its own decision without consulting the "owner" an automobile which it believes has bad brakes or a bad transmission, infra, p.5. Also, it decides when to turn on the "red light" over an automobile, conveying major defects.

Midwest, not the "owner" decides when not to accept a bid on the "owner's" automobile, such as, when the auctioneer thinks "in (his) opinion the bid offered is too low." (supra, Williams Dep. Tr. p. 77/12-16). If he "did not get what (he, the auctioneer,) thought was right or what the dealer expected, its no sale." (supra,

Williams Dep. Tr. p. 77/18-20). One would think that only an owner could decide that a bid is too low or a "no sale." Midwest's power and "possession" over automobiles and their decisions regarding them far exceeds the son's in Goeman, supra.

A non-involved intermediary, which opens its doors to allow sellers a forum to meet and sell to potential buyers, could not have such power and control as exercised by Midwest, unless it had sufficient indicia of ownership. Tusa v. Omaha Auto Auction, 712 F. 2d 1248(CA8 1983) with facts not nearly as pervasive of power and control, ruled against an auction simply because it accepted title briefly in its name as a convenience to the seller. To satisfy the Federal, and at least the broader Michigan, odometer act, Midwest, as an agent, and in its own right for conspiracy in which one need not be a transferor, must be found liable. The Supreme Court's guidance is required to resolve the confusion in the Appellate and State courts, strengthen the statute and protect consumers from rampant fraud and fatalities.

B.CAN AN AUTOMOBILE AUCTION BE LIABLE FOR NEGLIGENT MISREPRESENTATION, FRAUD, NEGLIGENCE, AND UNDER THE CONSUMER PROTECTION ACT

Under agency law, Midwest, as Glime's uncontroverted agent, is liable to third parties for aiding and abetting its principal to commit fraud, gross negligence and failing to disclose its principal. Callaghan's Michigan Digest, Agency, Sec. 172, 167. See Restatement of Agency (2nd) Section 337, 348. Yet, the Sixth Circuit, ignoring Saive, affirmed the lower court, stating that "the various theories(against Midwest) presents difficult questions." (3/12/91 opin., p.7).

Knowing that the public would rely on their negligent misrepresentations or intentional fraud, the Midwest auctioneer and other Midwest employees, incontrovertibly and materially misrepresented the mileage as actual with the automobile being in perfect condition with new brakes. (R11#138, supra, exh. A). Nationwide Motor-Mich. vs Nationwide, 273 F.Supp.875(Mi.1967). Midwest had a duty to avoid these misrepresentations which created a foreseeable risk of harm, particularly because the risk of dangerous used cars or odometer fraud is high at auctions. Fed. Reg. Vol. 53, p.29464. Meyers v. Robb, 882 Mich. App. 549 (1978).

The lower court categorized these misrepresentations as "mere puffing", involving judgments upon which reasonable men may differ, citing, Hayes v. Silverthorn, 343 Mich. 421 (1955),

though not argued by the defendants and though all favorable inferences must be given to the non-movant. (R14#185, order & opin., p.13). Even in Hayes, the court found misrepresentations of fact, that is the furnace's model number was not puffing, though the parties had equal knowledge and experience. The puffing involved opinions, not facts. Like Hayes, misrepresenting facts, such as, actual miles and new brakes, is not puffing. Ibid. Even if "actual miles" and "new brakes" are regarded as opinions, if the parties lack equal knowledge of the goods, "the buyer has a right to rely upon the misrepresentations of excellence made by the seller." Ibid, p.426. Purchasers at a specialized auction can rely on an auctioneer's misrepresentations. Meyers v. Robb, infra. Midwest specializes in automobiles only. The Nebraska Supreme Court has held that under agency law an auction can be liable for making unknowing misrpresentations. Bender v. Erickson, 421 N.W. 2d 766(Neb. 1988).

Guarantying automobiles "in good condition" or "perfect condition" is an express warranty which Midwest with gross negligence or reckless disregard of the truth breached. Curby v. Mastenbrook, 286 NW 123 (1939), Boos v. Claude, 9 NW 2d 262. Hansen v. Firestone, 276 F 2d 254 (CA6 1960). Though the lower court attempted to distinguish Curby as involving a seller and not an agent, a petitioner can recover against an agent acting for the principal. Peoples v. Healy, 113 N.W. 2d 802, (the petitioner sued the agent, not the seller for the cash deposit because of the agent's misrepresentation.)

A false misrepresentation may be implied, such as, stating, as in the instant case, that only the AM/FM cassette was not working which implies everything else was working. Dunne v. Honeywell, 687 F. 2d 877 (CA6 1982). The petitioner reasonably believed that because none of the major defects listed on the window were check-marked on the buyer's guide, other than the radio not working, none existed, particularly with the automobile represented as "perfect condition" by Midwest. (R11#138, supra, exh. I). An "as is" sale is not a defense to fraud. Stemple v. Dobson (W. Vir. 1990)

Midwest violated its own procedures as it expects its garagemen (experienced in repairing automobiles for Midwest) and drivers to report defects in automobiles to management, including faulty transmissions(R14#178, Kernen Dep. Tr. p. 76/12-15, 78, 79, 82/15-24, 83/1-8, 86/16-24, 87, 90/13-20, 93/7, 94/16-20, 95/12-17, 96/20-24, 97/1-10 & 21-24, 98/10-14, 99/18-24, 100/1); yet, even if Midwest is on notice of serious automobile defects, such as, from a

repossessed automobile's "condition report" having various categories of potential mechanical problems of an automobile which a Midwest garageman evaluates as "good, fair or poor" and completes from merely driving it to the storage lot, it surprisingly does not announce them, though purchasers never see the condition report. (R14#177, 2 Michel Dep. Tr. p. 101-104. (R14#178, Kernen Dep. Tr. p. 100/8-24, 101/1-10). (R14#176, 1 Michel Dep. Tr. p. 9/11-24).

Midwest drove the subject automobile on at least 2 or 3 auction days. (R14#180, Supplemental Brief to Motion for Summary Judgment, p. 3; also, R11#138, Brief to Motion for Dismissal, p.3). Upon a minimal and cursory inspection of only a few minutes, the petitioner's uncontroverted mechanics noticed serious and dangerous mechanical defects; (R11#138, supra, exh. J&K); whereas, Midwest had the automobile more than a few minutes, having, driving and processing the same paperwork on it on 2 or 3 other auction days. The brakes were not even close to new, according to the petitioner's mechanic, so one could not even give Midwest the benefit of the doubt that they erred understandably. The transmission was blatantly worse and had to be replaced. (R14#180, supra, p. 15).

Midwest drives an automobile at least 5 times on each auction day. Glime testified that he had ran the instant automobile, as stated, through Midwest on 2 or 3 different auction days. When a dealer arrives with an automobile, a Midwest garageman will drive it to the yard for public viewing or to the storage lot. (R14#176,1 Michel Dep. Tr. p. 84/7, 85/2-6). Then at the right time, the garageman will retrieve it from the storage lot and drive it to the public viewing area of the grounds where it is parked. Ibid. Then, Midwest drives it from the viewing grounds to the auction block for sale. (R14#178, Kernen Dep. Tr. p. 72/21-23).

After the sale, the driver drives it to the storage lot. (R14#176,1 Michel Dep. Tr. p. 80/18). After a purchaser pays for an automobile, a Midwest garageman will retrieve the automobile from the guarded storage lot (R14#178, Kernen Dep. Tr. p. 91/22-24, 92/1,2). Totally Midwest drives automobiles at least **10-15 times!**

The instant automobile had a faulty transmission on the date of sale with serious problems with the first and second gears which are used for lower speeds. (R14#180, supra, p. 15). After the sale, (no pre-sale inspection was allowed) the defendants described this as a "mere linkage problem." Since an automobile

can not be driven past lower speeds on the auction lot, and since much of the driving while in the auction line would be stop and go until reaching the auction block, Midwest had ample opportunity to notice and report this blatant defect, not to mention the automobile's other serious defects, infra; or Midwest could have announced these defects, removed the automobile from the auction line, or at least stayed silent and not made misrepresentations of its condition.

These defects could have also been determined, according to the petitioner's mechanics, by the oil pressure gauge and other gauges on the dashboard which at least one of the many garagemen or drivers who drove the automobile should have noticed, but for negligence, reckless disregard of the truth or intentional fraud. Tenborius v. Slatkin, infra. (R11#138, supra, exh. K).

Upon its own decision, Midwest will remove from the auction line an automobile 1). with bad brakes or transmission (R14#178, Kernen Dep. Tr. p. 76/12-15, 78, 79, 82/15-24, 83/1-8, 86/ 16-24, 87, 90/13-20), 2). which dies in the auction line (R14#176, 1 Michel Dep. Tr. p. 166/16-22), 3). or which has an engine smoking from a blown hose. (R14#177, 2 Michel Dep. Tr. p. 70/6-10) (R14#178, Kernen Dep. Tr. p.93/ 6-9).

Midwest violated its own procedure of turning on the "red light" over automobiles having greater than 100,000 miles or unknown mileage, major defects, or faulty transmissions (R14#176, 1 Michel 145/15-24, 146/7-19), (R14#179, Williams Dep. Tr. p. 52/23,24, 53/1-4. (R14#178, Kernen Dep. Tr. p. 111/24, 112/1-8). The instant automobile was not a red light sale. Auctioneer Williams exercises discretion, unlike other auctions acting as mere intermediaries, and will turn on the red light for bad brakes or faulty transmission, but not for a non-functioning stereo, and, possibly, not for a non-functioning air-conditioner (R14#179, Williams Dep. Tr. p. 59, 61/23,24). "Red light" aside, Auctioneer Michel, also president, exercises discretion by what he will announce about an automobile. (R14#176, 1 Michel Dep. Tr. p. 156/8-22). Midwest exercised its discretion negligently or with reckless or intentional disregard of the truth.

Finally, pursuant to the factors indicating odometer fraud in the Michigan regulatory bulletins, which Midwest incontrovertibly received as a licensed dealer (R14#177, 2 Michel Dep. Tr. p. 96/7-10), Midwest had actual notice of odometer tampering: 1). The mileage on the outgoing odometer statement--which Midwest gave the petitioner--was altered and erased; 2). The vehicle was owned

by AAA, an insurance and motor club company; 3). It was assigned in a short time (1-1/2 months and during this short time, Glime attempted to sell it on 2 or 3 auction days); and 4). The odometer statement on the reverse side of the title was blank. (R11#138, Response to Motion for Dismissal, exhibit F.)

Though denying it initially, (supra, 2 Michel Dep. Tr. p. 49/12), Michel later testified that he instructs the office staff to review odometer statements to ensure their completeness, including the odometer boxes, (supra, 2 Michel Dep. Tr. p. 50-53), pursuant to their duty of care which Midwest breached causing harm to the petitioner. All titles in a dealer's possession and surrendered to the State with an application of title (which Midwest does, though Michigan law requires sellers to apply) must have the title odometer statement completed. (R11#138, supra, exh. E, p. 4). On the Midwest Bill of Sale given to the petitioner, the mileage is listed as 59, 125 without any disclaimer for its accuracy as other auctions'. (R11#138, supra, exh. H). Midwest could have wrote that the mileage as "unknown" as it did on another customer's bill of sale. (R#199, 2/17/89, Brief to Motion to Stay Petition for Fees, exh. A).

Also though initially testifying that Midwest has no procedure for reviewing titles for completeness, obtaining any missing information (supra, 2 Michel Dep. Tr. p. 62/3-7), (supra, Kernan Dep. Tr. p. 114/18-24, or even looking at titles (supra, 2 Michel Dep. Tr. p. 58/8-11), Michel later testified that they do (supra, 2 Michel Dep. Tr. p. 58/14-24) as a "matter of policy" pursuant to the Michigan regulatory bulletins. Midwest types the buyer and seller's name and address on the back of the title. The office manager and vice-presidents are expected to read these bulletins and circulate them to the office staff. (supra, 2 Michel Dep. Tr. p. 91/14-24, 92-94). However, Midwest never instructed Auctioneer Williams (who with president Michel are the only auctioneers) on odometer fraud, nor showed him these bulletins, but he may have seen them on a Bulletin Board at another auction (supra, Williams Dep. Tr. p. 91/2-4, 94/5-21). (supra, 2 Michel Dep. Tr. p. 59/5,7). Midwest has no procedures to minimize odometer fraud; thus used car dealers interested in committing fraud have a safe haven at Midwest.

Under "Duties of Dealers" of the 12/21/84 Regulatory Bulletin, p.2, (R11#138, supra, exh. F), a duty of care is imposed upon dealers who, upon notice of an irregularity, must:

> take affirmative steps to investigate used vehicles for odometer tampering. Dealers should not simply rely on odometer statements received from previous owners, believing that this insulates them from liability . . . every dealer should establish internal policies and procedures for tracking, inspecting and identifying . . . odometer fraud.

Midwest could have had Glime have the previous owner complete the odometer statement on the title; or it could have requested the incoming odometer statement from Glime(which he received from AAA) to verify that the mileage on the suspicious title and the altered outgoing odometer statement(given to the petitioner) was indeed actual. Had Midwest complied with this bulletin in some fashion or another, or not intentionally committed fraud or misrepresentation, the petitioner would not have been harmed.

Finally, if the Sixth Circuit had conducted a de novo review, it could have determined whether the lower court was correct in construing the Michigan Consumer Protection Act (MCLA 445.903), so narrowly as common law fraud. (R14#185, order & opin., p.15). It, being a broad remedial Act, is construed liberally to prohibit unfair and unconscionable business practices. Mayhall v. Pond, 341 N.W. 2d 268 (Mich. App. 1983), holding the defendant liable for claiming that the diamond was "perfect", analogous to Midwest which announced the automobile as "perfect." McRaild v. Shepard, 141 Mich. App. 406 (1985), involving an unconscionable and deceptive automobile sale.

Failing fraudulently or innocently to disclose to a purchaser that an automobile dealer had difficulty paying its debts constituted a failure to reveal a material fact. Tenborius v. Slatkin, 403 N.W. 2d 821 (Mich. App. 1986). Midwest's failure to turn on the red light, reveal its principal or the documentary odometer incompleteness strongly indicating fraud, and its fraudulent misrepresentations and unconscionable and deceptive conduct violated the broad remedial consumer protection Act.

By refusing to review the issues de novo, the Sixth Circuit was giving encouragement to other auctions and used car dealers who are considering whether to engage in or increase their fraudulent practices.

c). Deferring to the district court without conducting any review, did the Sixth Circuit err by denying the petitioner's motion

to transfer to his home State, holding that the Supreme Court's decision in Worldwide prevented the transfer, though since Worldwide, the Supreme Court has greatly expanded personal jurisdiction?

By affirming the lower court's holding that the Section 1404 transfer would violate Worldwide, infra, the Sixth Circuit erred by not following the current Supreme Court precedents. Since Worldwide, the Supreme Court has greatly expanded personal jurisdiction because of modern technology. See Keeton v. Hustler Magazine, 465 U.S. 70(1984), in which the petitioner, having absolutely no connection with New Hampshire, was allowed to sue the defendant there as the only state in the union where the statute of limitations had not run, though the defendant had minimal contact there. See, Burger King v. Rudzewicz, 471 U.S. 462(1985).

In Worldwide Volkswagon v. Woodson, 444 U.S. 286, 100 S. Ct. 559(1980) the court denied jurisdiction in Oklahoma over an East Coast automobile dealer because foreseeing that a mobile vehicle could cause harm afar would not satisfy due process. This dissent, now prevailing in the High Court, stated that the automobile dealer, whose profits from the sale could pay for insurance for defending in another state, should have foreseen and not been surprised that it could be subject to suit in another state.

In the instant case, a much stronger basis for jurisdiction exists. Glime and Midwest intentionally committed fraud onto one they knew was an Illinois resident who would be returning home; thus, contrary to the lower court's assertion, the test is not foreseeability, but knowledge, that is, the defendants knew of their intentional torts and that the petitioner would soon be injured in his home state; whereas, the defendant dealer in Worldwide did not know that the automobile was defective and that it would be taken to Arizona. Returning to Illinois was not a "fortuitous circumstance" under Worldwide.

Deferring without an independent review, the Sixth Circuit affirmed the lower court which erred by requiring changed circumstances since the complaint's filing for a Section 1404 transfer. (R4#34, order & opin., p.4). No such Sect. 1404(a) requirement exists, though courts conflict. Indeed, Cordis vs Siemens-Pacesetter, 682 F.Supp 1200 (Fl. 1987) stated that courts ruling contrarily have relied on erroneously construed holdings. Nevertheless, circumstances did change. Post-filing, the petitioner's two Illinois mechanics changed their minds and politely refused to testify in Michigan. (Motion To Reconsider Denial of Transfer--not

part of record, but included in appendix, p. 17.)

> Certainly to fix the . . . trial . . . where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to the court, jury or most litigants. Golf Oil vs Gilbert, 67 S.Ct. 839, 844 (1947).
>
> If (the) plaintiff chose the wrong forum in the first instance he should not be deprived of the right to correct his mistake," as plaintiffs ordinarily choose the most convenient forum to vindicate their rights. Leopard v. Asphalt, 190 F. Supp. 726 (1960), citing J. Kaufman; see also, Farmer vs Coca-Cola, 366 F. Supp. 725 (TX 1973).

Deferentially, the petitioners' Sect. 1404(a) burden is considerably less to avoid trapping them in the mistaken forum. 15 Wright and Miller, Fed. Pract. and Proced., Sec. 3848 f.n. 30, particularly when, as in the instant case, minimal discovery had occurred. No tactical advantage or forum shopping existed to sue in Michigan, but for a mistake. The Sixth Circuit erred bynot reviewing de novo the lower court's denial of the Section 1404 transfer, though it involved federal statutory construction.

2. Is an order regarding sanctions by a magistrate, a non-Article III judge, dispositive? Courts of Appeal differ.

In Lancellotti v. Fay, 909 F. 2d 15, 17(1st 1990) the First Circuit declined to address the "vexing question" of whether a magistrate's sanctions are dispositive or non-dispositive, as the Sixth Circuit in the instant case. Indeed, as in many other cases involving sanctions, the magistrate in Lancellotti did not enter an order, but made a "recommendation to the district court judge. The judge then conducted a de novo review, implying that the issue was dispositive; whereas, in Klapper v. Commonwealth Realty, 657 F.Supp. 948,952(Del. 1987). the magistrate issued his Report and Recommendation, which implies that the sanction issue is dispositive, and the district court judge held that the issue was non-dispositive, requiring only a "clearly erroneous" review.

The Nineth Circuit has held that sanctions are non-dispositive. Maisonville v. F2 America, 902 F. 2d 746(9th Cir. 1990). However, the Seventh Circuit has held that without the parties' written approval under 28 USC Section 636(c) to be before

a magistrate, a magistrate has no power to enter a final order of sanctions. Silberstein v. Silberstein, 859 F. 2d 40(7th Cir. 1988). This ruling implies that sanctions are dispositive issues, constitutionally requiring a disposition by an Article III judge. see also Moore's Fed. Pract. Sect., 72.03[2.1].

One court stated that Maisonville and Silberstein "appear to be irreconcilable." Bergeson v. Dilworth, 749 F. Supp. 1555,1562(Kan. 1990). To alleviate the confusion amoung the lower and appellate courts, and to protect the litigants' rights to proper notification of the law, this vexing, irreconcilable question commands the careful direction and guidance of the Supreme Court.

a). Did the district court err by improperly reviewing the sanction order against the petitioner when the petitioner demonstrated the magistrate's bias towards the petitioner?

It is submitted that the District Court should have conducted a de novo review of the magistrate's sanction against the petitioner and the lack of sanctions against the used car dealer's attorney. It, not the magistrate, is ultimately responsible for adjudicating Article III controversies. Patterson v. Mintzes, 717 F. 2d 284(6th Cir. 1983). Such a review is imperative when a petitioner demonstrates that a magistrate is unfair, partial and biased. Indeed with bias the lower court should have intensified its review to provide additional due process safeguards. Matter of Yangman, 796 F. 2d 1165, 1181(9th Cir. 1986).

The Magistrate sternly stated(almost verbatim) that this is not the type of case that should be before the Chief Judge of the Eastern District of Michigan. Also, he stated that this case was taking too much time. (R#210, 3/16/89, supra,p. 4). At the 6/9/88 hearing, the magistrate stated that, but for the federal question, this case would not even be in federal court because of its minimal magnitude. (ibid, exhibit A, p.12).

The magistrate also failed to have a hearing prior to assessing sanctions in direct contravention of the due process requirements as stated in Roadway Express v. Piper, 447 U.S. 752(1980). Moreover, the magistrate had still not made his recommendations on the petitioner's second motion for default judgment against Glime though filed over 1-1/2 years before the magistrate granted Midwest's motion for sanctions against the petitioner though the second motion for default was fully briefed about 1 year before the motion for sanctions.

At the 8/9/88 hearing, as reflected in its order, the magistrate ordered that if the petitioner wanted a copy of Midwest's one page Bill of Sale, he would have to come to Detroit to obtain it, denying the petitioner's request that Midwest send it to a copy service which would have mailed it to him. (R13#174, order).

Though Rule 11's principal goal is not compensation, but deterrence, (Citations omitted) Jackson vs O'Hara , 675 F 2d 1224(6th Cir. 1989), and "reasonable attorney's fees . . . do not necessarily mean actual legal expenses," Invst, infra, at 404., the magistrate compensated the defendants for **nearly all** of their attorney's fees of $2380. from the petitioner's alleged non-compliance of a court order to revise the first set of discovery, though denying sanctions against the used car dealer's attorney completely.

"Reasonableness" includes a duty to mitigate, avoid self-imposed fees and not attempt a windfall against the opposing attorney's errors. Invst, supra. This includes a duty to curtail a response to any "unreasonable" discovery to avoid compounding fees. Ibid. The defendants' consistent obstruction of discovery and their two lengthy motions for protective orders to avoid answering **any** discovery were not calculated to avoid fees.

Mitigation aside, the magistrate did not consider the suit's complexity. Guthrie v. Hunter Marine, 118 F.R.D. 66(D.C. Tenn. 1987). Whether Midwest is liable under the odometer statutes, agency law, and common law for misrepresentation, gross negligence, negligence and so forth, raises complicated issues.

Finally, the court should consider the petitioner's experience. This was, for the most part, the petitioner's first lawsuit. (R#210, 3/16/89, p. 19). He had never been a litigator, working as a governmental auditor, lawyer drafting retirement plans, real estate manager, and, in-house corporate counsel. "The courts should educate (inexperienced attorneys), rather than punish them." Eastway, infra, at p.573. Despite his lack of experience, he attempted to research the law and obtain procedural advice when needed to vindicate his rights and seek justice for the wrong committed against him and those similarly situated. Sanctioning the petitioner is tantamount to stating that the courts are open only to the most experienced of litigators--an outcome not desired by Rule 26 or our judicial system.

The magistrate imposed Rule 26 sanctions for the petitioner's alleged noncompliance with his order. The 3/7/88 order vaguely stated, "petitioner shall . . .serve proper discovery

requests upon defendants." (R10#134, order). The 3/7/88 hearing was not more specific. The transcript demonstrates the magistrate's few general comments and little specific direction.

However, the magistrate was specific in the sanction order: the "petitioner . . . omitted only five interrogatories" (from the set to the officers . . .(and from the set to Midwest) petitioner's revised set omitted only three" (R#191, 1/27/89 order & opin. p. 5, 6). These comments imply that the petitioner's deletions were insufficient. But this begs the question how many would have been sufficient, 5, 10, 15, 20? Without a specific ruling, the answer to this question can only be a guess with the price of sanctions if, on hindsight, the guess is wrong!

Also, the magistrate, listing ten specific interrogatories, stated "of . . . (those) submitted to Michel and Kernen . . . the revised interrogatories still contained . . ." (ibid, p. 4). Implicitly, the magistrate found these interrogatories unnecessary, though not stating this at the hearings and though the defendants did not specifically object to these. If the magistrate had been as specific at the 3/7/88 hearing and order as the 1/27/89 sanction order, the petitioner would have deleted all ordered discovery immediately. Without a specific and clear order, basic fairness and due process dictated against sanctioning the petitioner. (Citations omitted) Jackson vs O'Hara, supra.

Any alleged incompliance was clearly an honest mistake which is a defense to Rule 11. Baranski vs Serhant, 106 F.R.D. 247 (N.D. IL 1985), cited in Eastway vs City of New York, 637 F. Supp. 558, 573 (E.D.N.Y. 1986) which is cited in Invest, supra, at p. 405. 567. Faced with a non-specific order and because the Midwest's motion for a protective order was granted, the petitioner, after the 3/7/88 hearing, used the motion as a guide to ensure compliance with the court order. He deleted each item to which Midwest objected point-by-point. Also, the petitioner sought a more experienced outside attorney, who has handled the defense of many odometer cases. The petitioner and this odometer attorney spent many hours reviewing, revising and attempting to comply with the court order. This attorney filed an affidavit that all of Midwest's concerns had been addressed and that the discovery in his opinion was clear and unambiguous. (R11#136, Response to Motion for Protective Order, p. 5). Thereafter, the revised discovery was served to Midwest.

In response, Midwest filed another motion for a protective order, though admitting that some interrogatories were answerable. The petitioner attempted another Local Rule 17 conference to

resolve the disputes, but the defendants seemed disinterested and more interested to proceed to a hearing than a mutual, conciliatory resolution. Subsequently, the petitioner submitted 2 correspondences with a 3/16/88 correspondence offering to rephrase the alleged incomprehensible interrogatories in another attempt to resolve the discovery disputes, but to no avail. (R11#136, supra, attachments).

Though the magistrate at the 3/7/88 hearing informed Midwest to discuss their differences with the petitioner pursuant to Local Rule 17, (R210, 3/16/89, supra, exh. B, p.10), the magistrate erred by excusing defense counsel's feigned attempt of compliance with Local Rule 17, partly because "plaintiff has the capacity to talk and argue at great length over the smallest of items." (R#191, 1/27/89 order & opin., p.10). However, 90% of the 3/7/88 transcript is filled by opposing counsel's inflammatory rhetoric which belies the magistrate's statement and demonstrates counsel's excellent ability as an architect of his own high billing. (R#210, 3/16/89, supra, exh.B).

At the 6/9/88 hearing on Midwest's second motion for a protective order, the magistrate struck the revised discovery and ordered a revision without having reviewed it and relying solely on the defendants' counsel. (R#210, 3/16/89, transcript, exhibit A, p. 6, 7). Distraught, the petitioner had an outside attorney completely redraft the discovery.

A lower court can not await the outcome of an appeal before awarding sanctions. Davis v. Crush, supra. Similarly, a magistrate can not "get on the bandwagon" and award sanctions because of and only after the district judge granted summary judgment. (R#191, 1/27/89 order & opin., p.2). Also, the magistrate's sanctions, awarded after summary judgment by the district court judge, and thus, analogous to a trial, violated Section 636 and F.R.C.P 72 which **only vests a magistrate** with pretrial, not post-trial, authority.

When the magistrate assessed sanctions, Midwest was no longer a party. Written discovery had been closed for several months. The petitioner had submitted the re-revised discovery 9 months prior without objection from Midwest. In effect, the goal of deterrence was unsatisfied, assuming arguendo that sanctions were warranted.

> The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by

tolerating abuses during the course of an action and then punishing the offender after the trial. In matter of Yangman, 796 F 2d 1165, 1183 (CA9 1986).

It is ironic, and with all due respect, a travesty of justice, that the petitioner--defrauded by Glime, and Midwest(at a minimum, negligence)--was sanctioned. Had the petitioner disrespectfuily ignored the court order, then he could understand why sanctions would be more than appropriate. But, he made every effort to comply and did comply and even sought the assistance of a more experienced attorney to ensure compliance. The lower court abused its discretion by not properly reviewing the magistrate's sanction de novo, particularly when bias was shown.

b). Did the district court err by improperly reviewing the magistrate's denial of sanctions against the used car dealer's attorney under F.R.C.P. 11, 26, 37, AND 28 U.S.C.SECTION 1927 for executing answers to the complaint, affirmative defenses, and answers to the request to admit facts all affirming the mileage as actual when he possessed an odometer statement asserting unambiguously that the mileage was NOT actual and should not be relied upon?

Numerous studies and law articles show that sanctions are overwhelmingly imposed against petitioners, and not defendants, are mostly imposed in public interest lawsuits and are imposed non-uniformly. Because of the frequent judicial, non-uniform use of sanctions, the Supreme Court's guidance is necessary. One example of the non-uniform application of sanctions can be seen in the instant case. The magistrate imposed sanctions against the petitioner for an alleged non-compliance with a discovery order, but did not impose sanctions against the used car dealer's attorney under the facts below.

The used car dealer's attorney filed false pleadings, made false representations to the court and engaged in obstructionistic and abusive discovery tactics which undermines any system of justice and must be deterred. The incoming odometer statement, which Glime received upon purchase from AAA, stated that the mileage was NOT actual and should not be relied upon. The altered outgoing odometer statement, which Glime and Midwest gave the petitioner, stated the mileage was actual and could be relied upon.

Though initially and falsely denying it, Glime's former

attorney, Mr. Waldman, later admitted having the incoming odometer statement pre-filing of the answer to the complaint (3/7/88 TR.p.25,73). Nevertheless, he executed answers to the complaint, affirmative defenses and responses to the request to admit facts affirming the mileage as actual. (R2#2, R5#46). He alleged that the petitioner's claim was frivolous and meritless. He even sent a correspondence to the petitioner threatening to sue for malicious prosecution. (R5#51, Motion for Rule 11 Sanctions, 12/5/86 correspondence).

Throughout the lawsuit, Attorney Waldman repeatedly refused to produce the incoming odometer statement despite requests to produce, correspondences, telephone calls, and 4 discovery conferences. As another ploy he represented in open court that he'd submit the incoming odometer statement in "today's mail." (R5:#51, Motion: Rule 11 Sanctions, p.6). It was never submitted on that day or any day. An attorney's promise in open court equates to a court order and its breach is sanctionable. Charter v. New Hampshire, 667 F2d 600(1981).

Frustrated with Attorney Waldman's obstructionistic tactics and continual noncompliance with court orders, the petitioner wrote to the Michigan Department of State in 6/87 for any helpful information. The State, submitted the incoming odometer statement to the petitioner. The State received this odometer statement from Attorney Waldman shortly before, though he refused to submit it in discovery, despite the aforementioned discovery conferences and court orders! (R5#51, supra, exh. 2). The incoming odometer statement verified that the mileage "was not actual" and could not be relied upon.

Astounded by the blatant documentary fraud, the petitioner contacted the court. At a conference, Attorney Waldman denied the information of Not Actual Mileage in the incoming odometer statement at least three (3) times. (R7#77, Second Motion for Sanctions, p. 5). This denial occurred even though the petitioner read the information to him and the court three (3) times, once after each denial, and though Attorney Waldman had sent the incoming odometer statement to the Michigan Department of State, Bureau of Automotive Regulations just several days prior! Waldman attempted disrespectfully to defraud the court and the petitioner by refusing to produce and concealing the incoming odometer statement which blatantly proved the used car dealer's fraud upon the petitioner.

Attorney Waldman falsely informed the court that he "established that the mileage was accurate" and that the petitioner's

"claim can not be substantiated." (R5:#51, ibid. p.15).

Despite the petitioner's correspondence to Attorney Waldman requesting the overdue answers to the interrogatories and documents, no answer was submitted until over 80 days after service and only after the petitioner filed a motion to compel. Despite being 2-1/2 months late, Attorney Waldman claimed that the answers were timely filed! These "answers" were incomplete and non-responsive. Minnesota Mining v. Eco, 757 F2d 1256(1985). Many objections were filed, though waived as not filed within 30 days, and not executed by Attorney Waldman. F.R.C.P. 33(a), 26(g). Indeed, Glime's attorney even objected to supplying insurance information though allowed by Rule 26(b)(2) and employment information for what the magistrate reprimanded him. (R5#51, supra, p.10-12; R5#52, supra, p. 4,5). Though the magistrate narrowed some of the interrogatories pursuant to Glime's objections, Attorney Waldman as Glime's counsel refused to answer the interrogatories pursuant to the court order.

Despite the Discovery conferences of 4/28/87, 6/2/87 and 6/17/87, Attorney Waldman, on behalf of Glime, still refused to comply. To this day, not even one document was ever produced pursuant to the request to produce. Attorney Waldman repeatedly refused to execute draft orders which the petitioner submitted to him. His behavior became so unbearable that the magistrate stated that Glime was very close to a default. (R5#52, supra, p.7).

Many of the "answers" to the interrogatories blatantly contradicted with their answers to the request to admit. (Please see R5#51, ibid, p.7-14 for a comparison). The magistrate erred in not sanctioning Attorney Waldman for these falsehoods. F.R.C.P. 11,26 and 37. Though Waldman did not execute the answers to the 1st set of interrogatories, many of the "answers" he completed or reviewed and allowed to be filed were non-responsive and incomplete. Also, he executed motions, responses and replies to motions upon premises which he unambiguously knew were false, that is, proof existed that the mileage was not actual. Attorney Waldman drafted false affidavits for his client to execute. These affidavits stated that Auto City Auction Auto Recovery and Auto Club (AAA) could not testify in Illinois. (R5#51, supra, p.12). However, neither were ever contacted regarding this case. ibid.

Shortly after receiving the incoming odometer statement, the petitioner in July 1987 filed a motion for Rule 11, 37, and 28 U.S.C. Section 1927 sanctions against Glime's attorney and a second motion for default judgment and sanctions against Glime. Two days after receiving these motions, Glime filed for bankruptcy.

The motion for sanctions was denied and the petitioner appealed to the district court judge who affirmed the denial without a de novo review, which is the standard, infra, for collateral orders, such as a denial of sanctions. (R11#146, order & opin.).

Failure to submit a police report, like the incoming odometer statement, or amend the discovery answers, F.R.C.P. 26(e)(2) was a "knowing concealment." Dorsey v. City of Detroit, 858 F2d 338 (CA6 1988). Attorney Waldman's concealment enormously prejudiced the petitioner. Many discovery conferences and motions to compel would have been unnecessary. Midwest and AAA could have been sued many months sooner.

Sanctions are imposed when the legal process is abused. In Albright vs. Upjohn Company, 788 F.2d 1217 (CA6 1986), as surmised by Guthrie v. Hunter Marine, 118 F.R.D. 66 (D.C. Tenn. 1987). They are also assessed for ignoring court orders, filing motions for the improper purpose of concealing evidence proving odometer fraud as a matter of law, and failing to execute proposed draft orders. Herron vs. Jupiter Transportation, 858 F.2d 332 (CA6 1988). Invst vs. Chem-Nuclear, 815 F.2d 400 (CA6 1987).

The petitioner has presented this issue to the court for its guidance because of the confusion and non-uniform application of the granting and denial of sanctions. This is not a case in which Attorney Waldman submitted in discovery the incoming odometer statement evidencing false mileage and then continued to represent his client. This is a case in which an attorney concealed evidence which he repeatedly refused to submit pursuant to disco very requests.

Also, this is a case in which an attorney filed on behalf of his client **false answers** to the interrogatories, **false requests to admit, false affidavits** prepared by this attorney and so forth, though he knew of their falsity. Indeed the request to admit, answers to the complaint and other documents were executed by both Glime and Attorney Waldman. Attorney Waldman's conduct, according to the magistrate, was "negligent and dilatory and sloppy." (Please see R5#52, 2nd Motion for Default, p.4-8, for verbatim discussion between magistrate and Waldman). (3/7/88,TR.,p.58.)

It is respectfully submitted that Attorney Waldman's conduct was far more severe and that the lower court abused its discretion by improperly reviewing the magistrate's order. The magistrate's ruling was dispositive and should have been reviewed de novo.

3. Does the used car dealer's bankruptcy preclude a petitioner from proceeding against it to judgment, so that he could collect against the used car dealer's surety? Courts of Appeal differ.

Because the bankruptcy code's automatic stay, 11 USC Section 524, applies only to debtors and not non-debtors, "where a creditor's rights against a surety are contingent upon recovery of judgment against the bankrupt," the petitioner must be allowed to proceed until final judgment against a debtor. In re Gertstenzang, 52 F.2d 63 (D.C.N.Y.1931); see also, Wedgeworth v. Fibreboard, 706 F. 2d 541(5th Cir. 1983), Pitts v. Unarco, 698 F. 2d 313(7th Cir. 1983), In re Casqul, 22 B.R. 65(Bkrtcy. 9th. Cir. 1982), as cited in In re Capitol-York vs. Lynnhaven, 43 B.R. 52 (N.Y.1984), the court allowed the creditor to proceed against the statutorily required surety bond to pay the unpaid sub-contractors.

However, the Sixth Circuit affirmed the district court and disallowed the suit to continue against the debtor because the petitioner did not object to the debtor's dischargeability, presumably preventing the surety from seeking indemnification from the debtor. (R#239, 8/9/89 order & opin.). In effect, the Sixth Circuit is holding that Section 524 protects non-debtors as well. This ruling conflicts with the rulings of other courts of appeals and ignores Section 524. If allowed to stand, the Sixth Circuit's ruling will strip future defrauded petitioners from obtaining a judgment against a defendant, such as, a used car deaeler, so as to collect against the defendant's surety.

The Sixth Circuit's ruling is erroneous for at least 3 reasons. First, as stated, Section 524 protects only debtors, not non-debtors. Under section 524(c) a "suit against a debtor . . . to establish liability of . . . a surety . . . would not be barred." 3 Collier on Bankr., 15th ed. 524.01 (3), p. 524. A bar would "disadvantage innocent . . . creditors . . . when there are assets available." In re White, 73 BR 983 (Bankr. D.C. 1987).

Defrauded consumers, under Michigan law, can collect against the surety for its insured's (used car dealer's) fraud only after receiving a judgment of fraud. Contravening other courts of appeals, the Sixth Circuit's decision suffrocates the petitioner from proceeding against the surety.

"One of the principle purposes for obtaining a guarantor to a note is to provide an alternative source of repayment in the event that the principal obligor debt is discharged in bankruptcy." United States vs. Kurtz, 525 F.Supp.734, 742 (E.D.PA.1981), Cert.

denied, 459 U.S.991,103 S.Ct.347 (1982).

Secondly, the surety was not harmed by the petitioner's non-filing of the adversary complaint. Unlike the petitioner, the surety's claim against the debtor was not based on fraud, but contract; thus, the surety was a general unsecured creditor whose claim was automatically dischargeable in the debtor's estate of "no assets." The petitioner's non-filing of an adversary complaint under Section 524 did not affect the surety's ability to collect from the debtor. The petitioner was barred under Section 524, but the surety was not.

A petitioner has no obligation to protect a surety. Indeed even In Re Mann, 58 B.R. 953(bankr. W.D. Va.), as cited by the Sixth Circuit in the instant case, and overwhelming case law, the creditor did not object to the debtor's discharge; or file a motion to lift the automatic stay, whereas the petitioner did in the instant case

Nevertheless, the petitioner notified the debtor's bond companies, Insurance of North America and Dependable Insurance, on 6/25/87 by telephone and correspondence--prior to the bankruptcy filing--of the petitioner's claim. (R#233, 7/24/89, Motion to Reconsider, exh. A,B). Neither intervened in the lawsuit, filed a contingent claim, or any type of claim or pleading against the debtor's "no asset" estate.

The lower court assumed with no evidence in the record, nor argued by the debtor or surety; 1). that the surety would have even attempted to seek indemnification from the debtor's alleged "no asset" estate; 2). and that the responsible surety could not collect against the debtor, even if assets existed.

The court's limited role should have been to grant or deny the default judgment against the debtor and allow the surety, which was not before the lower court, to raise any arguments it may want to raise in a proceeding against it.

> Since the (sureties) are not parties to this proceeding, the District Court's authority is limited to permitting the claimants to proceed against the (sureties). In re White Motor Corporation, 761 F.2d 270 (CA6 1985),

If the Sixth Circuit were concerned about the surety's rights, it should have remanded the case, require that the surety be named as a party and allow the surety to raise its defenses at the proceeding--instead of completely barring the petitioner from proceeding to judgment for fraud against the used car dealer-

Glime.

The defendant paid premiums to the surety, pursuant to state statute, to protect defrauded consumers and allow them to collect against a surety. Barring the suit to continue against the debtor would be a windfall for the surety receiving premiums as the quid pro quo for providing coverage at the expense of defrauded petitioner-consumers. Collier on Bankr., Section 2.07(3) at 362-49, as cited In the Matter of McGraw, 18 B.R.140 (WI 1982), allowing the suit to proceed against the discharged employee to prove the employer's vicarious liability, though the employer's claim against the employee was discharged.

Though a surety finds a discharged debtor noncollectible, it "makes no sense legally or equitably for an insurer to escape insurance coverage . . . merely by the happenstance of the insured's bankruptcy charge. Such a result would be fundamentally wrong." In re Lembke, 93 B.R. 701 (N.Dak.1988), citing, In re White, 23 B.R.983 (D.C.1987).

Also, the debtor would not be deterred from future fraud, if a defrauded consumer could not proceed against his surety. If the surety is held financially responsibly for the debtor's fraud, it could collect higher premiums in the future from Glime. Even if Glime changed sureties, another surety would learn of his fraud and also require higher premiums. The result would be to deter Glime and other used car dealers hearing of this case from engaging in future consumer odometer and other kinds of fraud.

Michigan requires used car dealers to be bonded to provide a defrauded consumer with a guarantor, if the used car dealer files for bankruptcy. The lower court's ruling is contrary to the clear language of Section 524, legislative intent, principles of equity and justice, and effectively discharges the surety's duty under the statute and the contract with the used car dealer to reimburse defrauded consumers. The Supreme Court's guidance is requested to resolve the conflict now created with the Sixth Circuit's break from the trend of the other circuits of the construction of Section 524.

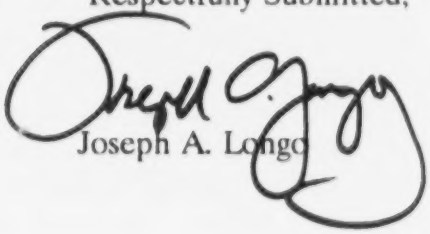
V. CONCLUSION

The Court of Appeals is in a better position to establish law that protects the public than the district court. The Court of Appeals is required to review de novo State and Federal questions. The Sixth Circuit declined to review accordingly, stating that the issues were difficult, close and complex. In so doing, the Sixth Circuit affirmed the lower court, and thus, gave automobile

auctions and used car dealers more arsenal to defraud consumers.

The circuits are divided on whether an agent can be liable under the Federal Odometer Act. The Supreme Court's attention is needed to strengthen the odometer laws and protect consumers from billions of dollars of fraud and unknowingly dangerous automobiles. Indeed this issue has reached such importance that CBS' 60 Minutes reported it in early 1991. Finally, whether sanctions are dispositive or not has created confusion amoung the Appellate and lower courts. The Supreme Court's guidance is needed, along with adding some direction in the massive non-uniform application of sanctions.

Respectfully Submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-1952
89-1997
89-2010

JOSEPH A. LONGO,)
Plaintiff-Appellant,)
)
v.) Appeal from the United
) States District Court for
DON GLIME; MIDWEST) the Eastern District of
AUTO AUCTION AND) Michigan.
SERVICE,JAMES KERNEN,)
ALVIN MICHEL)
)
Defendants-Appellees)

FILED MARCH 12, 1991

Per Curiam. Joseph Longo, an Illinois attorney and resident, bought a used 1980 Porsche automobile in September 1985 from defendant, Don Glime(Glime), a Michigan resident, individually and doing business as Perri Auto Sales, at a Michigan automobile auction conducted by a Michigan business, defendant Midwest Auto Auction and Service(Midwest). Longo has been litigating this purchase about what he claims was a misrepresented "lemon" car since filing suit based on diversity and a federal law claim against Glime and Midwest in federal district court in Michigan. The bill of sale contained this prominent statement: "Sold as is--no warranty implied."

Longo claims that he paid $9,000 cash, what he thought was fair market value, for the automobile in question, and he claims(in a motion for change of venue to Illinois, or for a nonsuit under Fed. R. Civ. P. 41(a)) that defendant Glime "stated" it was in "perfect condition." After buying the car in Michigan and having a friend drive it back to Illinois, Longo, shortly thereafter, assertedly experienced problems with it and a mechanic told him "the car had serious mechanical problems," transmission deficiencies, and in his opinion,had been driven more than the 59,125 mileage reflected on the odometer.1 Another mechanic assertedly was of a similar view

about the Porsche.

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1 The odometer mileage statement on the Porsche dated September 4, 1985, furnished by Glime as transferor in Detroit to transferee Long, reflected 59,725 miles with a certification that to the best of Glime's knowledge this "reflects the actual mileage." A prior July 1985 bill of sale from Auto Club Insurance Ass'n, transferor to Glime, buyer, at auction reflected by the same type certificate 58,408 miles with an additional check marked on the form to the effect that the odometer was not set back. Glime purportedly paid $5100 for this "salvage" Porsche through Auto City Auto Recovery, an insurance auto salvage operator.

Petitioner sued under 15 USC Section 1981, et seq.(the Odometer Act), the Illinois Consumer Protection Act, and on other bases of false misrepresentation or fraud. Longo was unsuccessful on his motion to change venue and/or to dismiss without prejudice. The parties pursued acrimonious discovery and sanctions against each other in connection with the suit.

The district court in October 1987 dismissed defendant Midwest based on untimely service under Fed. R. Civ. P. 4(j). A few weeks later, petitioner was permitted to amend his complaint and to add two alleged officers of Midwest as well as Midwest itself and to seek a jury trial. 2 Glime had filed a petition in bankruptcy in July of 1987 and his attorney sought to withdraw as counsel in November, after Glime had been discharged on November 4, 1987, by Bankruptcy Judge Graves in Detroit. 3 Longo was listed in bankruptcy as an unsecured creditor. The district court denied the motion to file the second amended complaint and request for a jury trial. The court also denied Longo's claim for sanctions. Voluminous discovery efforts by petitioner proceeded apace.

Midwest, Michel and Kernen then moved for summary judgment. Longo, by motion, requested "to appear by telephone" at the hearing on this motion. The magistrate in the case held petitioner's discovery demands upon Midwest, Michel,and Kernen to be excessive and unreasonable and struck the interrogatories and production requests. Defendants also moved for sanctions against Longo and for an order directing plaintiff to respond to their

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2 Longo sought to file a second amended complaint in February 1988 against Glime, Midwest, and two of the latter's officers, Michel and Kernen. Plaintiff sought rescission and damages, punitive damages, and odometer damages as well against Midwest and its officers. Longo claimed damages for failure to verify the odometer statement, and also sued under the Michigan Consumer Protection Act and the Michigan Odometer Act. Longo also added Auto Club Insurance Association claiming odometer fraud and damages under the Michigan Consumer Protection Act.

3 The bankruptcy court lifted the stay to allow Longo to pursue his claim against Glime but discharged the latter in November. Longo filed no objection to the discharge.

discovery requests. Rule 11 sanctions were granted against Longo for his suit against Michel and Kernan. The district court granted summary judgment in favor of Midwest, Michel and Kernen. The dismissal of claims against the individuals was based upon the following conclusions:

> In the present case, the plaintiff failed to present any facts pertaining to the liability of the defendants Kernen and Michel until he submitted his second supplemental reply brief on September 21, 1988. Dismissing the claims against defendants Kernen and Michel,therefore, comports with the three-pronged purpose behind the creation of Rule 9(b): First, it prevents the plaintiff from suing persons in the hope that facts might subsequently surface which would support the allegations; second, dismissal would protect the individual defendants' reputations; third, factual allegations contained in a supplemental reply brief, filed over two years after the filing of the original complaint,nearly nine months after the filing of the amended complaint,and over five months after the filing of the defendants' motion to dismiss, cannot be said to provide the individual defendants with adequate notice of the charges against them. Therefore, without addressing the merits of the plaintiff's contentions against Kernen and Michel, the court dismisses the claims

against these individual defendants for failure to comply with Rule 9(b).

The district court dismissed plaintiff's claims of negligence against Midwest on the following basis:

> In order to prove negligence under Michigan law, the plaintiff must establish that the defendant owes the plaintiff a legal duty, that defendant did not exercise ordinary care in performing this duty, and that the defendant's negligence was the proximate cause of the injury incurred by the plaintiff. Temborious v. Slatkin, 157 Mich. App. 587,599(1986)(per curiam), In Michigan, however, auctioneers have no duty to inspect items they auction. The court in Meyers v. Robb, 82 Mich. App. 549,556(1978), reasoned "that the risk created by an auctioneer's failure to inspect the items to be sold is a reasonable risk" and, as a result, does not serve as the basis for which an action in negligence may be maintained. Therefore, the defendant's failure to institute procedures to prevent the sale of defective automobiles or of automobiles having inaccurate odometer readings is not actionable.

The district court, as a matter of law, found on basis for plaintiff's negligence claims against Midwest. Since Midwest never took title to the Porsche, the court also found that Midwest wasnot a transferor within the meaning of 15 USC Section 1988(a), and therefore odometer claims did not lie against Midwest. Under the Michigan law, the district court held that Midwest was not an"owner" of the Porsche, never took title, and was thus "not obligated to comport with the requirements in the statute." The court also held that remarks of the driver of the car and the auctioneer at the auction were "puffing" or "seller's talk" and not actionable as fraudulent misrepresentations nor under the Michigan Consumer Protection Act. See Vulcon Metals Co. v. Simmons Mfg. Co., 248 F. 853(2nd Cir. 1918), and Hayes Const. Co. v. Sliverthorn, 343 Mich. 421, 426(1955).

The district court awarded $2260 as sanctions in favor of Michel and Kernen, 10% of the total fees submitted by then as incurred by reason of Longo's claims,plus the magistrate's sanction of $2230 for discovery abuse and violations.

The district court considered the bankruptcy discharge to

preclude any recovery of the discharged debt claimed against Glime. Plaintiff, however, in December of 1987 filed a motion to vacate the discharge in bankruptcy, but this motion was denied. Plaintiff claimed in district court that Glime had posted a surety bond, and plaintiff should be permitted to pursue his claim against that $10,000 surety bond. Holding that "a surety must be provided the opportunity to present evidence to rebut or contradict liability on its bond" under Michigan law, the court granted summary judgment for Glime,4 but indicated that Longo might pursue his claim against the bonding company separately.

Longo appealed the judgment granted Glime and the other defendants based upon claims of " negligent misrepresentation, fraud gross negligence or . . . negligence," the Michigan Consumer Protection Act, and the odometer statutes, federal and state. He also appealed the award of sanctions against him and the denial of his motion for sanctions against Glime's attorney, and the earlier order denying transfer to Illinois and denying leave to sue the auto club(AAA-Michigan) as a defendant. (Waldman, the Glime attorney, cross appealed for failure to award him and/or his client sanctions). Midwest, Michel and Kernen cross appeal the denial of sanctions to Midwest and the amount of sanctions granted the individual defendants.

q This record is full of pleadings, motions, filings and briefs submitted by the various parties. We find the issues to be close on the question of odometer fraud and violations of the federal and state laws on this subject with respect to defendant Midwest. We are satisfied, however, that Longo has not established that the district court committed error in granting judgments to Glime by reason of the discharge in bankruptcy, see, e.g. In Re Maqnn, 58 BR 953,959(bankr. W.D. Va.)(treating correction of errors committed in bankruptcy court as a matter of equitable discretion), and to Michel and Kernen for the reasons stated int he district court's opinion.

While the plaintiff's case against Midwest on the various theories presents difficult questions, we are persuaded, after looking at this record, that the experienced Michigan judges sitting as district court judges in this lengthy and unfortunate controversy have not been shown to have acted erroneously in construing the

4 On motion for reconsideration, the district court held that plaintiff's failure to act promptly and properly in bankruptcy court to object to the discharge of Glime barred relief in the district court.

federal and state law and issues involved. We **AFFIRM** therefore, on the issues of liability as to all defendants.

With respect to sanctions, we **AFFIRM** the denial of sanctions against Martin Waldman and his firm, and the denial of Waldman's claim for sanctions, finding no abuse of discretion in this regard. Mihalic v. Pro Arts, 851 F 2d 790, 793(6th Cir. 1988). We also **AFFIRM** on the same basis the magistrate's determination of sanctions against Longo in the amount of $2230. On the question of sanctions denied to Midwest, we **AFFIRM** again based on no showing of abuse of discretion. See Oliveri v. aThompson, 803 F2d 1265(2d Cir. 1986)(cited in Jackson v. O'Hara, 875 F2d 1224(6th Cir. 1989)).

Finally, we **REVERSE** and **REMAND** on the question of liability and amount of sanctions imposed against Longo with respect to his fruitless actions against Michel and Kernen. There is insufficient rationale in this respect for this court to review this question adequately, and there is no adequate explanation for the imposition of sanctions in the amount of $2260.

Costs are assessed against Longo on his claims against all parties on claims of liability, except Midwest,which will hear its own costs. Longo and Michel and Kernen will each bear their own costs on the sanctions questions, as will Waldman.

Leonard Green, Clerk

By_____

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-1952
89-1997
89-2010

JOSEPH A. LONGO,)
Plaintiff-Appellant,)
)
v.) Appeal from the United
) States District Court for
DON GLIME; MIDWEST) the Eastern District of
AUTO AUCTION AND) Michigan.
SERVICE,JAMES KERNEN,)
ALVIN MICHEL)
)
Defendants-Appellees)

FILED MAY 8, 1991

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

15 USC Section 1981
The Congress hereby finds that purchasers when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and or affect such commerce. It is therefore the purpose of this title(15 USC Section 1981 et seq) to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers.

15 USC Section 1986
CONSPIRACY TO VIOLATE ODOMETER REQUIREMENTS
No person shall conspire with any other person to violate section 403, 404, 405, 407, or 408(15 USC Sections 1983, 1984, 1985, 1987, or 1988).

15 USC Section 1989

(a) Any person who, with intent to defraud, violates any requirement under this title(15 USC Section 1981 et seq.) shall be liable in an amount equal to the sum of--

28 USC Section 1404
(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.